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No. 73-361

SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

AUGUSTE JOSEPH RICORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1973 (Pet. App. 1a-2a). A petition for rehearing was denied on June 28, 1973 (Pet. App. 3a). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and includ-

ing August 27, 1973, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly extradited to the United States from Paraguay.

2. Whether the grand jury improperly considered hearsay evidence.

3. Whether the district court correctly denied petitioner's motion to suppress evidence.

4. Whether the evidence proved petitioner's guilty knowledge.

5. Whether the conduct of the district judge deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit narcotics offenses, in violation of former 21 U.S.C. 173 and 174. He was sentenced to twenty years' imprisonment and fined $20,000. The court of appeals affirmed from the bench without opinion (Pet. App. 1a-2a).

1. On September 18, 1970, United States Customs agents in Miami were furnished a copy of an anonymous letter directed to the FBI, describing in detail certain small aircraft said to be carrying large quantities of narcotics into the United States (Tr. 55-

59).[1] On October 18, 1970, one of these airplanes arrived at Miami International Airport from Kingston, Jamaica (MS 23-24, 33). Upon its arrival at Miami, the craft and its occupants were placed under surveillance. The two pilots left the plane, cleared Customs inspections, and went by taxi to Miami (MS 34-35, 44-51, 110-114).

On the following day, October 19, 1970, the pilots (Bianchi and Balestra) returned to the plane and flew to a small local airport at North Perry, fifteen miles from Miami. The flight took forty minutes, because Bianchi made evasive maneuvers in an unsuccessful attempt to evade the surveillance officers' aircraft (MS 130-134). Bianchi and Balestra left the airplane at North Perry and drove to Miami, following a circuitous route. The plane remained under surveillance (MS 68-69, 115-118). That evening, Customs agents entered the plane and discovered two suitcases hidden behind a fuel tank. A plastic bag containing white powder was removed from one of the suitcases, and tests disclosed the presence of heroin (MS 71-74). On October 20, 1970, the agents re-entered the aircraft, removing the two suitcases and another. The three valises contained a total of 94 pounds, or 42 kilograms, of heroin (MS 84-85; Tr. 407-425).

2. Bianchi was arrested on October 20 as he attempted to board a commercial airliner to return to

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[1] "Tr." refers to the transcript of trial, "MS" to the transcript of the hearing on the motion to suppress, and "Doc." to the various numbered documents comprising the certified record on file with the Clerk of this Court.

Paraguay. He agreed to cooperate with the agents and implicated several other co-conspirators (Tr. 257-258, 772, 783-784). Bianchi revealed that he had met with co-conspirators Varela and Muravnik in June 1970 and arranged to fly 60 kilograms of heroin to the United States. They had obtained the narcotics from petitioner in Paraguay, at a motel petitioner owned there. Petitioner showed them to the cabin where the heroin was kept and personally assisted them in removing the packages. Bianchi flew the heroin to Miami, arriving on June 24, 1970 (Tr. 217-228).

In July 1970, Varela, Muravnik, and co-conspirators Becker and Gahou, pursuant to orders from petitioner, had traveled to Uruguay to receive delivery of a Citroen automobile arriving by ship from France. They drove the vehicle to Varela's house in Paraguay, where petitioner went to claim it. Inside the Citroen were concealed 70 kilograms of heroin (Tr. 537-542, 708-709).

On September 2, 1970, Bianchi flew to Miami from South America and Panama at Varela's request, carrying a load of 30 kilograms of heroin (Tr. 233-238, 543-545). The following month, fifteen kilograms of heroin were transported from Miami to New York by some of the conspirators and delivered to Nicholas Giannatasio, pursuant to instructions from petitioner. Giannatasio gave conspirator Gahou $107,000 in cash. Becker took $100,000 of this money to Paraguay, where Varela delivered it to petitioner (Tr. 555-568, 710-721).

Several days later, in mid-October 1970, petitioner delivered another load of heroin, totalling 42 kilograms, to Varela and Bianchi at petitioner's motel in Paraguay (Tr. 245-254). It was while Bianchi was attempting to deliver this shipment that the scheme was discovered by Customs agents and Bianchi was apprehended.

ARGUMENT

1. Petitioner contends that the federal government's actions in procuring his extradition from Paraguay were so offensive to that nation as to deprive the United States courts of jurisdiction of the instant case. We submit, however, that petitioner is without standing to present the issue here. He contested his extradition in the courts of Paraguay on the same grounds raised below; the government of Paraguay nevertheless ordered his surrender to the United States for prosecution.

The record conclusively shows that from the time of the formal extradition request, Paraguay was at all times fully advised of this nation's reasons for seeking petitioner's removal. The United States Ambassador averred that petitioner, who was not known to have entered the United States, had been indicted for conspiracy to violate 21 U.S.C. (1964 ed.) 173 and 174 in connection with a major narcotics importation enterprise. The extradition request was based upon the procedures outlined in the treaty of extradition in effect between the United States and Paraguay, and on general principles of comity, particu-

larly in view of the seriousness of the international narcotics problem and the willingness of other nations to extradite for narcotics offenses despite the absence of specific treaty provisions (Doc. 19).

No misrepresentations were made to the Paraguayan government, and petitioner was tried for the precise offense for which he was extradited.[2] Petitioner was treated exactly as Paraguay expected when that nation ordered petitioner's surrender. Petitioner has not shown that our government's conduct in any way offended the government of Paraguay. Unless Paraguay would have cause to complain, petitioner cannot raise that country's rights as a defense to extradition. *Ker* v. *Illinois*, 119 U.S. 436, 441; *Fiocconi* v. *Attorney General*, 462 F.2d 475 (C.A. 2), certiorari denied, 409 U.S. 1059. In any event, even if petitioner were removed from Paraguay as the result of an irregular or illegal extradition procedure, that is no bar to the exercise of jurisdiction by a court which has obtained control of petitioner's person. *Frisbie* v. *Collins*, 342 U.S. 519, 522; *Ker* v. *Illinois*, *supra*, 119 U.S. at 440.

2. Petitioner urges that hearsay evidence was improperly submitted to the grand jury which indicted him. In March 1971, petitioner was indicted on a charge of conspiracy to violate 21 U.S.C. (1964 ed.) 173 and 174. In October 1972, following petitioner's extradition to the United States, a superseding in-

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[2] Petitioner was tried on a superseding indictment returned after his arrival in the United States, but the later indictment did not differ from the first insofar as it pertained to petitioner.

dictment was returned, identical to the first insofar as it concerned petitioner, and it was on the second indictment that petitioner was tried. The second grand jury heard the transcript of the first grand jury proceeding, read by the prosecutor. The transcript contained the testimony of Felix Becker, a co-conspirator. As petitioner acknowledges (Pet. 13-14), the minutes were furnished to petitioner and used in cross-examining Becker at trial.

In contending that an indictment may not be based entirely on hearsay, petitioner misconstrues the clear holding of this Court in *Costello* v. *United States*, 350 U.S. 359, where it was stated (*id.* at 363):

> An indictment returned by a legally constituted and unbiased grand jury, * * * if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

Accordingly, "[n]either justice nor the concept of a fair trial" requires the Court to establish a rule permitting challenges to indictments based upon the sufficiency or competency of the evidence presented to the grand jury. *Id.* at 364; see also *Lawn* v. *United States*, 355 U.S. 339, 349-350. Petitioner's rights were protected by the full safeguards of trial. Cf. *United States* v. *Blue*, 384 U.S. 251, 255, n. 3. Moreover, petitioner can claim no prejudice, since the transcript of the eyewitness's prior testimony was made available for his use in impeaching the credibility of the witness at trial.[3]

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[3] Petitioner's reliance upon *United States* v. *Estepa*, 471 F.2d 1132 (C.A. 2), and other Second Circuit cases is un-

3. Petitioner contends that the district court erred in refusing to suppress as evidence the heroin discovered during the warrantless search of the airplane belonging to co-conspirator Bianchi. However, the search was not directed against petitioner, who was wholly unknown to the agents at the time of the search. Petitioner is without standing to challenge the search and seizure, since he was not in or about the aircraft at the time of the search, alleged no proprietary interest therein, and was not charged with an offense which includes possession of the contraband as a necessary element. *Brown* v. *United States*, 411 U.S. 223, 229. See *Jones* v. *United States*, 362 U.S. 257, 263-264.

Petitioner appears to rely for standing upon the fact that the government's bill of particulars alleged petitioner to be the owner of the heroin (Pet. 22). However, since illegally imported heroin is contraband, and wrongfully held, petitioner could have no legitimate interest or expectation of privacy in his ownership of the drug in the United States. Cf. *Brown* v. *United States*, *supra*, 411 U.S. at 230, n. 4; *Jones* v. *United States*, *supra*, 362 U.S. at 267.[4]

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availing, since the grand jury in the instant case was fully aware of the nature of the testimony presented to it. The applicability of *Estepa* was briefed below, and the court of appeals, in affirming petitioner's conviction, implicitly recognized that its previous holding in *Estepa* had no effect here.

[4] Neither the intrusion into the aircraft nor the search thereof affected any right or expectation of privacy of petitioner. Thus, petitioner clearly had no standing to object to the legality of the search prior to the time that the hidden suitcases containing the heroin came, as a result of the search,

Moreover, the district court properly concluded that the warrantless search could be upheld either as a border search or as a search upon probable cause (Pet. App. 23a-24a). In arguing that a search of the aircraft at the North Perry airport could not be sustained as a border search, petitioner relies on *Almeida-Sanchez* v. *United States*, No. 71-6278, decided June 21, 1973. That case, however, holding only that "border searches" do not include random, roving searches of automobiles conducted some distance from the border or its functional equivalent, has no application to the facts here.

In the instant case, the search was not "random" or "roving". Customs officials had received an anonymous but detailed tip concerning the use of particular aircraft to import narcotics. When one of these aircraft landed at Miami International Airport, no immediate "border search" of the aircraft was undertaken, but it and its occupants were placed under surveillance. Thereafter, the craft was flown to a small, local airport only a few miles away, following an evasive route under aerial surveillance. The craft was searched later that day, after the pilot had left it and returned to Miami by automobile, again using a devious route.

The right to conduct a full customs search, without probable cause, at the time of the aircraft's arrival in Miami can scarcely be questioned. Nor should the investigatory officers, who suspected a

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into plain view. At that point, there was manifest probable cause for the seizure.

major narcotics smuggling operation, have been required to tip their hand by an immediate search, when surveillance of the plane and its occupants for a day or two offered the prospect of further uncovering details of the suspected criminal conspiracy. As a result of this surveillance, it was reasonably certain that the plane and its contents were intact—as at the time of crossing the border—when the search did take place, so that the search was indeed the "functional equivalent" of a border search.[5]

Moreover, the combined circumstances—the appearance of an aircraft which was the subject of the anonymous tip, the evasive maneuvers after takeoff from Miami and the subsequent landing a few miles away after 40 minutes in the air, the suspicious actions of the pilots—all gave the Customs officers probable cause to believe that the tip was accurate and that the plane was being used to transport contraband. Cf. *Chambers* v. *Maroney*, 399 U.S. 42, 46; *Draper* v. *United States*, 358 U.S. 307, 313. Accordingly, even if the search were not sustainable as a border search not requiring probable cause, it was entirely proper as based on probable cause. A warrant could not practically have been required, more-

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[5] It has been recognized both in *Almeida-Sanchez* (slip op., pp. 6-7) and other cases that customs searches may be conducted at times and places distant from the actual border crossing. See *United States* v. *Garcia*, 452 F.2d 419, 421-422 (C.A. 5); *Walker* v. *United States*, 404 F.2d 900 (C.A. 5); *United States* v. *Rodriguez-Gonzalez*, 378 F.2d 256 (C.A. 9). See also *United States* v. *Glaziou*, 402 F.2d 8 (C.A. 2), certiorari denied, 393 U.S. 1121.

over, since the parked plane could have been readied for takeoff in a few seconds (MS 60; Pet. App. 23a). See *Carroll* v. *United States*, 267 U.S. 132, 153-156; *Chambers* v. *Maroney*, *supra*, 399 U.S. at 51.

4. Petitioner contends that the government failed to prove petitioner's guilty knowledge in connection with the conspiracy. In fact, however, petitioner's knowing participation in the crime is well supported by the evidence.

In the instant case, as our statement of facts shows, the evidence established that on two occasions in 1970 petitioner led co-conspirators to a cabin of the motel which he owned in Paraguay and assisted them in removing a total of more than one hundred kilograms of heroin from the motel for export to the United States (Tr. 217-228, 245-254). On another occasion, petitioner directed other co-conspirators to pick up an automobile arriving from France, which contained a large quantity of concealed heroin (Tr. 537-542, 708-709). He also accepted payment of $100,000 in cash for heroin delivered in New York (Tr. 555-568, 710-721).

That petitioner was aware of the nature of the substance with which he dealt is manifest from the furtive manner in which the business of the conspiracy was conducted and from the large sum of money involved. Hence, even apart from the statutory inference of former 21 U.S.C. 174,[6] it is clear that

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[6] As petitioner notes (Pet. 26), the government was entitled to avail itself of a statutory inference under 21 U.S.C. (1964

the jury was entitled to believe that petitioner knowingly possessed heroin and that he knowingly conspired to introduce the drug illegally into the United States.

5. Petitioner cites numerous incidents that in his view constitute examples of prejudicial conduct on the part of the trial judge. The principal contention is that petitioner was afforded insufficient time to prepare for trial. The record shows, however, that petitioner's attorney entered his appearance in the case in September 1972, shortly after petitioner's extradition to the United States and nearly ninety days before trial.[7] Petitioner filed numerous motions, and hearings were set for October 16, 1972, with trial to follow on October 30. Petitioner, however, requested and was granted a five-week adjournment of trial to December 4 (Doc. 22, p. 43).

It was not until late November 1972 that petitioner sought permission to depose witnesses in Paraguay

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ed.) 174, which permitted the jury to convict if it found petitioner to have an unexplained possession of the narcotics.

Purely circumstantial evidence is sufficient to show possession. *United States* v. *Febre*, 425 F.2d 107, 110 (C.A. 2), certiorari denied, 400 U.S. 849. Moreover, a showing of dominion and control of the drug sufficient to amount to constructive possession will suffice to invoke the statutory inference. *United States* v. *Calabro*, 449 F.2d 885, 891-892 (C.A. 2), certiorari denied, 404 U.S. 1047; *United States* v. *Febre*, *supra*, 425 F.2d at 111; *Bass* v. *United States*, 326 F.2d 884, 886-887 (C.A. 8), certiorari denied, 377 U.S. 905.

[7] Since petitioner was incarcerated, the government was entitled to only ninety days to prepare for trial under the Second Circuit's "Rules Regarding Prompt Disposition of Criminal Cases."

and to interview government witnesses. The court granted these requests, imposing only the condition that these activities not delay the commencement of the trial (Doc. 26, pp. 2-3). It is thus plain that it was only petitioner's tardiness, and not unreasonable rulings of the court, which "forced" petitioner to trial less fully prepared than he might have wished. Moreover, as the district court noted (Tr. 1316), the conduct of petitioner's counsel during the trial manifested careful and thorough preparation.

Petitioner also argues that the trial court failed to safeguard against the possibility that the jury would be influenced by newspaper publicity concerning petitioner. The record fully answers this assertion. During the *voir dire* of prospective jurors, the court asked whether any of the venire had read or heard anything about the case in the news media (Tr. 30-31).[8] Throughout the trial as well, the court repeatedly cautioned the jurors against exposing themselves to news reports concerning the case (*e.g.*, Tr. 183-184, 349, 528). When petitioner's counsel complained during the trial that a prejudicial story had appeared in the *New York Times*, the court inquired whether any of the jurors had read the *Times* or any of several suburban newspapers (Tr. 352-353, 363-365). None said they had.

Petitioner's other allegations of judicial misconduct are similarly without basis in fact. The record shows

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[8] The sole juror who had seen a news item concerning the case was not challenged by petitioner peremptorily or for cause (Tr. 54-55).

that the trial was conducted in an orderly atmosphere, with no apparent hostility between the defense and the court, and that the court at all times was careful to ensure that petitioner received a fair and impartial trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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